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No. 223

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SWIFT & COMPANY, APPELLANTS

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Northern District of Ohio, Eastern Division

CIVIL No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CIVIL No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of Rules of the Supreme Court of the United States, as amended, defendants-appellants United States of America, Interstate Commerce Commission, and Swift and Company submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction

75830-1—47——1

on appeal to review the judgment and decree of the District Court entered in these causes on May 14, 1947. A petition for appeal was presented and allowed on July 11, 1947, together with a presentation of an assignment of errors.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the decisions in these causes is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in these cases: *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612; *United States* v. *Lowden*, 308 U. S. 225; *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98; and *Interstate Commerce Commission* v. *Hoboken Manufacturers' Railroad Co.*, 320 U. S. 368.

STATUTES INVOLVED

Interpretation of a number of sections of the Interstate Commerce Act, as amended (49 U. S. C. 1 *et seq.*), particularly Sections 1 (3a), 1 (6), 1 (9), and 3 (1), and the Elkins Act, Section 2 (49 U. S. C. 42) are involved in this appeal.

THE ISSUES AND THE RULINGS BELOW

The statutory three-judge District Court for the Northern District of Ohio, Eastern Division, by its judgment and decree of May 14, 1947, set aside an order of the Interstate Commerce Commission dated May 3, 1946.

The principal facts giving rise to the order are as follows:

The plant of Swift and Company (intervening defendant-appellant herein) located in Cleveland, Ohio, and those of six other companies are so situated that the loading and unloading tracks on their respective properties can be reached from the main line of New York Central Railroad (hereafter referred to as the Railroad) only by means of a spur track, known as Spur Track No. 245, the initial 132 feet of which is located on Railroad's property and an additional 1,619 feet of which runs across land owned by the Cleveland Union Stock Yards Company (hereinafter referred to as Stock Yards).

This spur track was constructed in 1899 pursuant to a contract between Stock Yards and Railroad. Under this contract Stock Yards paid the cost of constructing this track and also paid for maintaining it. Railroad had the right to use the track, without cost, for business other than that of the Stock Yards so long as this use did not interfere with the business of Stock Yards. By an agreement made in 1924, superseding the contract of 1899, Railroad was required to main-

tain the track. Until 1935 shipments were made over the track to the sidings of the various companies which it reached, including that of Swift and Company.

In 1935, the 1924 agreement was amended by Railroad and Stock Yards so as to prohibit free use of the track by Railroad for "competitive" traffic, which the parties construed to mean livestock. The charge for that use was to be the subject of a separate agreement, but since the charges for such use demanded by Stock Yards were substantially in excess of Railroad's switching charges, no further agreement was made and Railroad discontinued deliveries to Swift's siding. Shipments which Swift billed to its Cleveland plant were delivered to Stock Yards, which assessed yardage charges against Swift for livestock so delivered.

Each of the foregoing agreements between Stock Yards and Railroad was subject to cancellation on comparatively short notice.

Three competitors of Swift having plants adjacent to Stock Yards are reached by Railroad's main line without having to pass over land of Stock Yards.

By its order of May 3, 1946, the Commission required Railroad and other railroad carriers connecting with it to deliver livestock to Swift's siding track in Cleveland and to establish and maintain tariffs for such shipments. The order also required Stock Yards to permit the track

which it owns to be used in the manner directed by the Commission's order. The Commission based its order on Section 3 (1) of the Interstate Commerce Act prohibiting unreasonable preferences or discrimination, Section 1 (6) making it the duty of railroads to establish and observe just and reasonable practices affecting the delivery of property, and Section 1 (9) providing that railroads shall operate upon reasonable terms a switch connection with any private sidetrack which may be constructed to connect with such railroads. The Commission regarded these provisions as complementary.

The Commission's conclusion that delivery of livestock to Swift should be required was based upon its finding that the actual use which had been made of the spur track in question had made it a part of Railroad's system and had given the track a common carrier status which could not be limited or subtracted from by contract between Railroad and Stock Yards.

The District Court set aside the Commission's order primarily upon the ground that the facts did not warrant the finding that the track on Stock Yards land had ever been devoted to public use because, in the view of the court, the Commission had left out of consideration contractual provisions between Stock Yards and Railroad asserting ownership, reserving property rights to limit the character of shipments, and stipulating cancellation rights upon thirty- or sixty-day

notice. Under these circumstances the District Court concluded that the Commission's order constituted an unlawful interference with Stock Yards use of its property.

The report of the Commission upon which its order of May 3, 1946, was based is set out in 266 I. C. C. 55.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants contend that the District Court's judgment is not only erroneous as a matter of law, but if permitted to remain in effect will be productive of much practical harm and serious consequences adversely affecting the public interest in an efficient and adequate public transportation system as required by the National Transportation Policy. If the District Court's holding in these cases is correct, it follows necessarily that any owner of private land over which a spur or side track connection with a railroad passes may, by contract, preclude shipments in commerce except upon such terms as it chooses to impose and interdict completely the jurisdiction of the Commission to enforce the provisions of the Interstate Commerce Act.

We submit that a railroad carrier subject to the provisions of the Interstate Commerce Act cannot enter into a contract the effect of which is to abrogate its obligations under the Interstate Commerce Act. We further contend that by the clear language of Section 2 of the Elkins Act (49

U. S. C. 42), Stock Yards was subject to the jurisdiction of the Interstate Commerce Commission in the circumstances of these cases and was a proper party to the Commission's order. In substance the District Court's decree prevents the Commission from regulating a portion of Railroad's public side track or terminal at Cleveland merely because a portion of such side track or terminal is leased by Railroad from a noncarrier corporation.

The District Court's opinion and decree fails to recognize that under the Interstate Commerce Act a piece of track need not be owned by a railroad company in order to be subject to the requirements of that Act. Section 1 (3a) specifically provides that the term railroads shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation * * * of * * * persons or property * * * including all freight depots, yards or grounds used or necessary in the transportation or delivery of any such property." Appellants contend that it is clear that Railroad operated over the 1,619 feet of track for a considerable number of years "under a contract, agreement, or lease," and that as found by the Commission the track has been devoted to a public use.

Although the District Court in its opinion held the Commission's order invalid on one ground only, in its findings of fact and conclusions of law it held the order invalid upon other grounds. Even though the court stated in its opinion that the facts in these cases as set forth in the Commission's report were not in dispute, it found and concluded that there was no legal basis for the Commission's finding that Section 1 (6), condemning unreasonable practices, was violated. The court also concluded that the Commission had no lawful basis for its findings of violations of Section 1 (9), requiring railroads to operate switch connections with private sidetracks, and Section 3 (1) forbidding unjust preferences or discrimination among shippers.

These other grounds raise important questions as to the meaning and application of the Interstate Commerce Act which will be presented on appeal if the Supreme Court disagrees with the ground of decision stated in the opinion below.

We submit that the foregoing important questions respecting the administration of the Interstate Commerce Act present issues which are substantial.

Copies of the District Court's opinion dated March 11, 1947, its finds of fact and conclusions of law entered May 9, 1947, and its final judgment and decree of May 14, 1947, are appended hereto.

Dated July 1, 1947.

Respectfully submitted.

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756504—47——2

In the District Court of the United States for the Northern District of Ohio, Eastern Division

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CIVIL No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CIVIL No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MEMORANDUM

Before ALLEN, Circuit Judge, and JONES and FREED, District Judges

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JONES, *District Judge:*

These two cases, by stipulation of the parties and order of the Court, were consolidated for hearing and decision since they arise out of the same facts and circumstances, and in each case the same order of the Commission is challenged

and sought to be enjoined. The plaintiffs in both cases were parties to the proceedings before the Commission and it was against both of them that the Commission issued its single order now under consideration.

The facts are not in dispute and are fully set forth in the Commission's opinion and in the several briefs of the parties.

For the purpose of decision the facts briefly may be summarized:

The Cleveland Union Stock Yards Company of Ohio has been engaged in the business of operating public stock yards and a public market, on its own lands, in the City of Cleveland since 1893. Since 1921 its stock yards have been posted as a stock yard under the provisions of the Packers and Stockyards Act and from then until now it has operated under the jurisdiction of the Secretary of Agriculture. It has no railroad equipment and operates no trains or cars.

In May 1899, the Stock Yards Company entered into agreement with The New York Central Railroad Company (then the Big Four) to construct track 1619 (1,619 feet in length) upon lands of the Stock Yards Company to connect with a 132-foot spur from the Railroad Company's main track. The Railroad laid the track and maintained it at the Stock Yards' expense. The Railroad was given the right to use the track, without cost for business other than that of the Stock Yards Company, provided such use did not

interfere with the business of the Stock Yards Company. The agreement contained a 60-day termination clause. In June 1924, that agreement was canceled and another private sidetrack agreement was executed by the Stock Yards Company and the Railroad for operation over lands of the Stock Yards Company and over the same track 1619. A 30-day termination clause was inserted in this second agreement.

Although Swift & Company earlier and successfully had negotiated for a spur and sidetrack directly from the Railroad Company's main track to its own siding (plaintiff's exhibit 11, with map and letters attached) this opportunity of securing direct service was abandoned by Swift & Company as too expensive, and Swift & Company continued to be served by the Railroad Company over the Stock Yards Company's private track and the Railroad's own switch track and "wye" beyond; and this with full knowledge on the part of Swift & Company of the Stock Yards' continued assertion of its complete ownership of track 1619 and the contractual reservation for the termination of its use.

In February 1935, another contract superseded the agreement of June 1924, prohibiting free use of track 1619 for competitive traffic, construed by the Railroad and Stock Yards to mean live stock shipments, a charge for which was to be the subject of separate agreement. No agreement as to the charge for such shipments being reached be-

tween the Railroad Company and the Stock Yards Company, on November 12, 1938, the Railroad's switching charge was made inapplicable to live stock. For some time prior to that date, and ever since, the Railroad has refused to deliver any live stock shipments to Swift & Company's private siding over Stock Yards' track 1619. After an ineffectual exchange of letters between the Railroad and Swift & Company the latter, on September 5, 1941, filed its complaint with the Commission.

We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction. In this case we consider only the legality of its order upon the record. The Railroad complains that the Commission's order requires it to do an unlawful act and that it can not comply with the order because it is without control over the Stock Yards' property and track 1619; that the contract for the use of the track excludes the transportation of shipments of livestock to Swift & Company and that it, the Railroad, is without the means of accomplishing what the Commission orders. The Stock Yards Company asserts that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law.

There are various other allegations in the complaints urged by both plaintiffs to support their contentions that the Commission's order legally cannot stand.

We address ourselves to what we conceive to be the principal and fatal flaw in the Commission's order. We assume, without deciding, that under the Elkins Act the Commission has jurisdiction over the Stock Yards Company when made a party as in this case and has the power to enter a lawful order affecting the Stock Yards in respect of matters in which the Commission has authority.

Upon the hearing of the petition of Swift & Company seeking to require the Railroad to deliver, and the Stock Yards to permit delivery of, its shipments of livestock to its plant over track 1619, the Commission ordered these two complainants to do so, notwithstanding the fact that track 1619 is owned by the Stock Yards Company and is wholly upon its private property. The only reason for thus subjecting the private property of the Stock Yards Company to the use of Swift & Company appears to be a finding that track 1619 for a number of years has been devoted to public use.

We think the finding does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the

Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively. Certainly, upon these facts and upon the record there has been no such devotion of track 1619 to public use as to amount to a dedication of the Stock Yards' property as a public highway or as a part of the Railroad Company's system over which the latter lawfully may move shipments of freight or livestock to the Swift & Company plant.

Both Swith & Company and the Commission rely heavily upon *Morgan Run Rwy.* v. *Public Utilities Commission,* 98 U. S. 218; 120 N. E. 295, and *Alton R. R. Co* v. *Ilinois Commission,* 305 U. S. 548; 555. It is our opinion that neither of these cases furnish support for the order. The former we think not pertinent since it arises out of and depends upon the construction of State statutes. Also, in that case there were the following facts which undoubtedly influenced decision: It was conceded that the controlling interest in the railway company and the coal company was owned by substantially the same persons, although in different proportions, and that the same person was president of both companies. In the latter case the owner of the land over which the shipments were required to be made apparently was not a party, nor did the owner present any objection to the use of the private property. This latter decision also was based upon the effect of a State statute. On

page 555 of *Alton R. R. Co.* v. *Illinois Commission, supra,* the opinion makes it clear that the situation here readily may be distinguished. Contrary to the appellant in that case, the Railroad here *is* asserting that it would be a trespasser and without right to continue to use the track as required by the order. At the conclusion of the second paragraph on page 555, the Court cites *Roberts* v. *Northern Pacific R. Co.,* 158 U. S. 1, at page 11; and *Northern Pacific R. Co.* v. *Smith,* 171 U. S. 260, at page 271. In these cases the land owner made no effort to assert ownership, nor did the owner make any objection or take any steps to establish private property rights until long after trespass had been accomplished.

Here, the Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.

Although the Commission holds that track 1619 is now and for some years has been devoted to the public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently and notori-

ously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of track 1619 has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company openly to assert its complete ownership and restrict its use.

It was urged in argument before us by counsel for the Commission that such use of the track of the Stock Yards Company has made it a part of the New York Central Railroad system; and that the Railroad cannot refuse to continue to serve Swift & Company or others over that track since the Railroad acted unlawfully in contracting for its use. If the Railroad was out of bounds in entering into a contract with the Stock Yards Company which permitted withdrawal of service to Swift & Company, its wrongful conduct, if such it was, cannot be rectified by penalizing the Stock Yards Company and by taking part of its property. If the Commission lawfully may compel the Railroad Company to use track 1619 as its own or as one which it controls it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess. The order effectually subordinates and subjects the Stock Yards Company's ownership of its property to the bene-

ficial and preferential use of Swift & Company without due process of law.

We think that jurisdiction of the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property. The Commission can not, as we think, lawfully order the Railroad to do what by law is forbidden by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system. Such transfer of property lawfully can not be made short of condemnation and compensation.

The constant, consistent and notorious control reserved by contracts between the Railroad and the Stock Yards Company is sufficient bar to any legal finding that track 1619 had been devoted to the public use in the sense that the Stock Yards Company has surrendered some portion of its title or that the track thereby has become a public highway or common carrier.

To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

In the view we take of the case, the complainants each are entitled to the relief prayed for.

Treating the proceedings as one upon final hearing, enforcement of the order of the Commission will be permanently enjoined.

Findings and conclusions may be presented for adoption and a decree entered accordingly.

Filed: March 11, 1947.

In the District Court of the United States for the Northern District of Ohio, Eastern Division

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Civil No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed May 9, 1947. C. B. Watkins, Clerk, U. S. District Court N. D. O.

These two cases, in which the same facts and circumstances are involved and the same Order of the Commission is challenged and sought to be enjoined in each case, were consolidated by stipulation and order of the court and came on for hearing the 25th day of February 1947, upon the

complaints of the plaintiffs, answers, briefs, arguments, and certified record and evidence of all proceedings before the Interstate Commerce Commission, in its Docket No. 28714, entitled *Swift & Company* v. *The Baltimore & Ohio Railroad Company, Erie Railroad Company (Robert E. Woodruff and John A. Hadden, Trustees), The New York Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company and the Wheeling & Lake Erie Railway Company, The Cleveland Union Stock Yards Company, and the Livestock Terminal Service Company.*

Upon due consideration, the court adopts the Findings of Fact and Conclusions of Law hereinafter set forth:

FINDINGS OF FACT

The facts are not in dispute and may be summarized as follows:

I

The railroad and property of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company have, since 1930, been leased to and operated by The New York Central Railroad Company (hereinafter referred to as "New York Central"). The main line tracks of said railroad in the City of Cleveland extend in a general easterly and westerly direction, in the vicinity of West 65th Street. The Cleveland Union Stock Yards Company (hereinafter referred to as "Stock Yards")

owns and operates stock yards which are located adjacent to and south of said New York Central main tracks and right of way and bordering the westerly side of West 65th Street. The Stock Yards owns certain private side tracks located on its own land, among which is a private side track, 1,619 feet in length, which extends in a general northerly and southerly direction paralleling, and in close proximity to, the westerly line of West 65th Street. This 1,619 feet of track connects at its northerly end with the initial turnout or lead (132 feet long) from New York Central main tracks located on New York Central right of way, and forms the connecting track between the northern and southerly portions of what is called track No. 245. The southerly end of said 1,619 feet of track connects with a track 793 feet long, which extends southerly and is owned by New York Central and located upon lands owned by Stock Yards, or which lands were reserved for side track purposes by Stock Yards. This 793 feet of track, together with a switch track, known as No. 240 (Exhibit "C"), which diverges from the southerly portion of said hereinbefore described track No. 245, were built in 1910 at the request of and pursuant to arrangements made by Swift & Company (Exhibit No. 11) and track No. 240 was extended in an easterly direction across West 65th Street and thence northeasterly along the West 63rd Street side of Swift & Company's plant to enable delivery of

shipments to Swift & Company's meat processing plant at that point.

II

The Cleveland Union Stock Yards Company of Cleveland, one of the plaintiffs herein, is a non-carrier corporation, organized, existing and doing business under and by virtue of the laws of the State of Ohio, and, since 1893, has been engaged in the business of operating public stock yards and a public market on its own lands in the City of Cleveland. Since 1921, its stock yards have been posted as a stock yard in accordance with the provisions of the Packers and Stockyards Act, subject to the jurisdiction of the Secretary of Agriculture of the United States.

The Cleveland Union Stock Yards Company does not own, control or lease any rolling stock, locomotives or railroad cars of any kind. It operates no railroad. It owns no railroad tracks, other than private switch tracks located on its own land. One of these private switch tracks, designated in these proceedings as track 1619, and mentioned hereinbefore, is involved in this controversy. Carload shipments of all commodities consigned to or from Swift & Company's meat processing plant private side track and the side tracks of other packers and industries in that particular area must traverse this 1,619 feet of track and lands owned by Stock Yards in order for the New York Central to serve such plants with respect to carload shipments.

III

In May 1899, The Cleveland Union Stock Yards Company entered into an agreement with the lessor (The Cleveland, Cincinnati, Chicago & St. Louis Railway Company) of New York Central to construct certain private side tracks upon the lands of the Stock Yards, including the 1,619 feet of track here in question. The railroad laid the track and maintained it at Stock Yards' expense. The railroad was given the right to use the track without cost for business other than that of the Stock Yards Company. The agreement contained a 60-day termination clause.

On June 16, 1924, the agreement of May 1899 was cancelled and another private side track agreement was executed by the Stock Yards Company and the lessor of New York Central, providing for the use and maintenance of the same 1,619 feet of track and other tracks. This agreement contained a 30-day termination clause. The agreement of June 16, 1924, was superseded by an agreement, effective February 1, 1935, which prohibited the use of said 1,619 feet of track for competitive traffic, construed by the railroads and the Stock Yards Company to mean carload shipments of livestock, a charge for which was to be the subject of a separate agreement. The New York Central and the Stock Yards could not reach an agreement as to charges for the use

of said 1,619 feet of track for movement thereover of carload shipments of livestock and on November 12, 1938, the switching charge theretofore published in tariffs of plaintiff railroads for that reason became inapplicable to livestock consigned to or shipped from any industry reached by using said 1,619 feet of track. For some time prior to that date and ever since, plaintiff railroads have refused to deliver any carload shipments of livestock to Swift & Company's private side track or any other industry reached by using Stock Yards' 1,619 feet of track.

In a letter, dated August 14, 1941, Swift & Company notified the plaintiff railroads that all shipments of livestock would thereafter be billed for delivery at Swift & Company's plant in Cleveland, and requested that such delivery be made. After an ineffectual exchange of letters between the railroads and Swift & Company, the latter, an Illinois corporation, having a branch packing plant in Cleveland, Ohio, on September 5, 1941, filed with the Interstate Commerce Commission a complaint against the railroad companies hereinbefore named, the Cleveland Union Stock Yards Company and The Livestock Terminal Service Company (the latter-named company was a subsidiary of the Stock Yards Company and in the interim has been dissolved).

The Cleveland Union Stock Yards Company was named as a defendant in said complaint upon the theory that it was a proper party under the

Elkins Act (Section 42, Title 49 U. S. C.) and subject to the order of the Interstate Commerce Commission. Said complaint alleged, among other things, that Swift & Company is deprived of lawful transportation to which it is entitled in violation of Section 1 (3) of the Interstate Commerce Act, that the railroads had abandoned the operation of a portion of their line of railroad necessary to the Swift & Company's plant in Cleveland, without prior authority therefor, in violation of Sections 1 (18), 1 (19) and 1 (20) of said Act; that Swift & Company is subjected to unjust discrimination by reason of said railroads denying to Swift & Company services which were rendered to three competitors of Swift & Company, in violation of Section 2, and Swift & Company and its traffic had been subjected to undue and unreasonable prejudice and disadvantage, in violation of Section 3 (1) and said Act. In said complaint, Swift & Company sought the re-establishment of tariff provisions and other relief which would result in transportation to its plant in Cleveland of carload shipments of livestock at rates not in excess of the line haul rates of said railroads. The Cleveland Union Stock Yards Company was alleged to be party responsible for the alleged violations of the Interstate Commerce Act in that it refused to permit the delivery of livestock over its 1,619 feet of track.

V

After full hearing, the Interstate Commerce Commission, on May 3, 1946, found in favor of Swift & Company, against all the defendants in the proceedings before it, and at the same time issued the following order:

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3d day of May, A. D. 1946.

No. 28714

Swift and Company

v.

The Baltimore and Ohio Railroad Company, Erie Railroad Company (Robert E. Woodruff and John A. Hadden, Trustees), The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, The Wheeling and Lake Erie Railway Company, The Cleveland Union Stock Yards Company, and Livestock Terminal Service Company

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof,

made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and having found that the present practice of defendants in refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried over their lines and consigned thereto is in violation of section 3 (1), section 1 (6) and section 1 (9) of Part I of the Interstate Commerce Act, and having made the other findings required by said paragraph:

It is ordered, That the above-named defendants, or either of them, be, and they are hereby, notified and required to cease and desist, on or before the 30th day of August 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

It is further ordered, That said defendants, or either of them, be, and they are hereby, notified and required to establish and put in force, on or before the 30th day of August, 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipments of live-

stock carried over defendant's lines and consigned thereto.

And it is further ordered, That this order shall remain in full force and effect until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL,
Secretary.

By request, the effective date of the foregoing order was postponed from time to time, and finally to the _____ day of June 1947.

VI

The record before the Commission shows conclusively that Swift & Company at all times had full knowledge of the Stock Yards' continued assertion of its complete ownership, and reservation of control of use, of track 1619 and the fact that the Stock Yards reserved the right by agreement to terminate the use of said track.

Swift & Company earlier and successfully had negotiated for its own private sidetrack to be connected directly with the New York Central's main track and right-of-way at the north end of West 63d Street (Plaintiff's Exhibit 11, with map and letters attached), but this opportunity of securing service by means of a direct connection to the railroad company's main track was abandoned by Swift & Company as too expensive and Swift & Company then (in 1910) sought and obtained switching service to its private sidetrack, by the use of Stock Yards' 1,619 feet of track,

the construction of an extension of 793 feet of track to the southerly end of said Stock Yards track (being a part of track known as No. 245), and a wye track in connection therewith and extending said wye track across West 65th Street, in order to move cars thereover to Swift & Company's private sidetrack.

VII

At all times, Stock Yards consistently, constantly and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Swift & Company and six or seven other packing plants are served by the New York Central traversing Stock Yards' 1,619 feet of track with the consent of the Stock Yards for delivery of all classes of freight except livestock. Every shipper serving or being served by the use of said 1,619 feet of track has had full knowledge of Stock Yards' said ownership and control of said track. No one has been led to act to his harm by any sufferance or acquiescence by the Stock Yards in the use permitted of its track or by any failure upon the part of Stock Yards more openly to assert its complete ownership or to restrict its use. There is no evidence that Stock Yards has ever acquiesced in any use of its land or said track by the Railroad or Swift & Company, except under the provisions of the sidetrack agreement. The entrance upon the land of the Stock Yards and the use of its track

were not by sufferance, but, from beginning to the end, under the provisions of a written contract, expressly asserting ownership and reserving therein the property right of Stock Yards, limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively, all of which were well understood by Swift & Company, as well as by the Railroad.

In view of the foregoing facts, we think the findings of the Commission with respect to Stock Yards' 1,619 feet of track for a number of years having been devoted to a public use is without legal support in the record. Certainly, upon these facts and upon the record, there has been no such devotion of said 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company system over which the latter may lawfully move shipments of freight or livestock to the Swift & Company plant without permission of the owner.

VIII

The record is clear, and the Commission finds, that each of Swift & Company's three named competitors, i. e., the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, have constructed their own individual private sidetracks to connect directly with the main line railroad and right of way of the New York Central, and delivery to each of said three

named competitors is rendered without using any track belonging to Stock Yards. The physical conditions existing with respect to reaching these three plants are therefore definitely different from the conditions attendant upon reaching Swift & Company's plant.

IX

Railroad plaintiffs urge the point that the Commission's order would require the railroads to disregard the practices and rules promulgated by the Commission in connection with Ex Parte 104, part II, Terminal Services, with respect to placing and spotting of cars on sidetracks of private industries. In view of our findings with respect to the lack of legal support for other parts of the Commission's order, we make no finding with respect to this phase.

CONCLUSIONS OF LAW

I

The Interstate Commerce Commission transcended its constitutional and statutory powers when, in its order, it effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company, without due process of law. If the Commission lawfully may compel the New York Central to use Stock Yards' 1,619 feet of track as the railroad's own track, or as one which it controls, it would, by such

order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess.

II

The Interstate Commerce Commission cannot lawfully order the railroads to do what by law is forbidden, by declaring that the track of The Cleveland Union Stock Yards Company under the circumstances is a part of the New York Central system. Such transfer of property lawfully cannot be made short of condemnation and compensation. These questions are left to the Courts and not to the Interstate Commerce Commission.

III

Jurisdiction over The Cleveland Union Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Interstate Commerce Commission to order The Cleveland Union Stock Yards Company to desist from the practice of asserting or exercising complete ownership of and control over its property.

IV

For the purpose of this case the Court assumes, without deciding, that under the Elkins Act, Section 42, Title 49 U. S. C., the Interstate Com-

merce Commission has jurisdiction over the Stock Yards Company, since it has been made a party in the case, and has the power to enter a lawful order affecting the Stock Yards Company in respect of matters in which the Commission has authority.

V

The Cleveland Union Stock Yards Company is a non-carrier corporation organized under the laws of the State of Ohio in 1893, and it is engaged in a general stockyard business at Cleveland, Ohio. It is posted as a stock yard in accordance with the provisions of the Packers and Stockyards Act and it is thereby subjected to the jurisdiction of the Secretary of Agriculture of the United States.

VI

Whatever may be the legal status of the contract between the Railroad Company and The Cleveland Union Stock Yards Company, restricting the use of said 1,619 feet of track against delivery of livestock to the plant of Swift & Company, the Interstate Commerce Commission cannot lawfully rectify such contract by penalizing The Cleveland Union Stock Yards Company and taking part of its property.

The Cleveland Union Stock Yards Company has never at any time dedicated said 1,619 feet of track to public use as a public highway or a part

of the railroad system. It has constantly, by virtue of sidetrack agreements or contracts, asserted ownership and reserved property rights therein.

VIII

The Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.

Although the Commission holds that said 1,619 feet of track is now and for some years has been devoted to public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of said 1,619 feet of track has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company more openly to assert its complete ownership and restrict its use.

IX

The constant, consistent and notorious control reserved in written contracts between the railroad and Stock Yards is a sufficient bar to any legal finding that said Stock Yards' 1,619 feet of track had been devoted to the public use, in the sense that the Stock Yards has surrendered some portion of its title or that the track thereby has become a public highway or common carrier. There has not been any such devotion of Stock Yards' 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company's system under the provisions of Section 1 (3) (a) of the Act, over which track the railroad lawfully may move shipments of freight or livestock to the Swift & Company plant.

X

The Interstate Commerce Commission erred as a matter of law in ordering The Cleveland Union Stock Yards to devote the use of its said 1,619 feet of track and the property underlying the same for delivery of livestock to Swift & Company.

XI.

To require the service sought by Swift & Company, not only would amount to appropriation of the property of The Cleveland Union Stock

Yards Company for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

XII

In view of the undisputed disparity existing between the direct private sidetrack connections of Swift & Company's three named competitors and Swift & Company's own indirect private sidetrack connection the Commission exceeded its powers and authority in undertaking to invoke in Swift & Company's behalf the powers of the Commission under the provision of Section 1 (9) of the Act.

Notwithstanding the similarity of active competition and other phases of the same general business in which Swift & Company and its three competitors are engaged, the pronounced dissimilarity in track connections mentioned above in the failure of Swift & Company to bring itself within the purview of Section 1 (9), with respect to its own track connections, removes any basis for holding that there is any discrimination whatsoever against Swift & Company, or any undue and reasonable prejudice and disadvantage to Swift & Company in violation of Section 3 (1) of the Act with respect to delivery of carload shipments of livestock.

XIII

In view of the full knowledge by the complaining shipper of limitations placed upon the railroad's use of another private sidetrack, no legal basis exists for a finding of any violation of Section 1 (6) of the Act.

XIV

No provision is found in Section 1 (3) (a) of the Act to the effect that private property used by a carrier under contract for limited purposes thereby becomes a railroad for unlimited use. With the long history of the limited use permitted and made of Stock Yards' 1,619 feet of track and the full knowledge by the complaining shipper of such limited use, there is not any basis in law for a finding that the use of that track for said limited purposes constitutes it a part of the railroad system for the benefit of the shipper under the provisions of Section 1 (3) (a).

XV

Where, as in this case, the record before the Commission shows that a shipper had the opportunity of constructing its own private sidetrack to connect directly with the main line railroad and right of way of the railroad and such arrangement was available and could be operated with safety and the shipper discards that arrangement and chooses to obtain service to its

private track by the use of another privately owned track, the ownership and control of which was notorious and apparent at all times, there is no legal support for a finding to the effect that said complaining shipper is entitled to continuous service to its plant, nor is there any legal basis for a finding of a violation of Section 1 (9) of of the Act. There is no legal support for the authority or power of the Commission to require railroads to render service in making direct delivery to the private sidetrack of a shipper where there is a legal or physical obstacle preventing such service and where the complaining shipper is, as in this case, well aware of the permissive use only of an intervening private track granted by its owner to the railroads. The fact that the railroads may have gained some benefit for a shipper in obtaining limited use of a privately owned track for a period of time can not be found to have ripened into a right to require the railroad to provide the use of said intervening privately owned track for the further benefit of the shipper.

XVI

A railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in fact available for use. Common carrier services over private sidings and private industrial tracks cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevent it from entering upon those tracks, nor is it within the jurisdiction of the

Commission to order a carrier, or any other party, to take steps to remove such obstructions.

XVII

The complainants herein are entitled to the relief prayed for; the Report and Order of the Commission are beyond the lawful authority of the Commission and wholly illegal and void; said Order is hereby vacated and set aside and the enforcement thereof perpetually restrained and enjoined; The Cleveland Union Stock Yards Company is hereby declared to have the legal right to restrict the use of its industrial sidetrack for the protection of its business; it had, and has, the right to collect such compensation as it deems proper; it had and has the lawful right to cancel its sidetrack agreement with The New York Central Railroad Company and it had and has the legal right to withdraw entirely the use of its sidetrack for the benefit of Swift & Company and other packers and shippers located upon it.

Counsel for plaintiffs will submit order for appropriate judgment in accordace herewith.

(S) FLORENCE E. ALLEN,
Circuit Judge.

(S) PAUL JONES,
District Judge.

(S) E. B. FREED,
District Judge.

MAY 1947.

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